EUROPEAN COMMITTEE OF SOCIAL RIGHTS
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Case Document No. 1

***Confédération française démocratique du travail* (CFDT) v. France**
Complaint No. 189/2020

COMPLAINT

Registered at the Secretariat on 15 January 2020

Translator's note: I have created proper footnotes for this document but it needs a certain amount of reformatting, RJT

Document 1

COMPLAINT

Paris, 15 January 2020

***Confédération française démocratique du travail* (CFDT) against France**

Collective complaint lodged by the CFDT against the French Government for violation of Article 6, and more specifically Article 6§2 of the revised European Social Charter.

The complaint is in response to Article 8 of Order 2017-1385 of 22 September 2017 on strengthening the collective bargaining process (ratified by Law No. 2018-217 of 29 March 2018) and its Implementing Decree, No. 2017-1767 of 26 December 2017, on the arrangements for approving agreements in very small undertakings.

The Order of 22 September 2017 is one of a number of orders (all of them ratified by Law No. 2018-217 of 29 March 2018) intended to reform French labour law.

It is specifically designed to clarify the respective roles of branch and company-level agreements with, according to the Government, the aim of recognising and validating the key part played by collective bargaining and even, in certain circumstances, authorising company-level agreements to take priority over individual employment contracts.

As such, the order constitutes the final element in a series of major reforms that have overturned the rules governing social dialogue at company level and the role of company-level agreements: the ANI (national cross-industry agreement) on employment protection of 11 January 2013, Law No. 2015-994 of 17 August 2015 on social dialogue and employment and Law No. 2016-1088 of 8 August 2016 on employment, modernising social dialogue and protecting career paths. Their stated objective is to strengthen and legitimise social dialogue.

As these reforms have continued, numerous matters have been made the subject of company-level bargaining, moving away from the existing situation, in which employee safeguards and protection are the subject of various forms of regulation at branch level and in legislation.

The CFDT has worked hard to secure a more dynamic and effective form of social democracy and social dialogue that is closer to the workforce, conducted by representative social partners who are properly trained and knowledgeable personnel (hence the reform of the rules of representation in Law No. 2008-789 of 20 August 2008). Significant progress has been made.

However, the changes emanating from the Orders of 22 September 2017 constitute a setback to this vision of social dialogue and make it easier to *bypass the social partners*, while strengthening the position of employers.

Rather than establishing a strengthened and constructive form of social dialogue, the reforms have created a form of social monologue with no employee safeguards in undertakings with fewer than 11 employees and ones with 11 to 20, even though such staff are the most at risk from this point of view. The CFDT can only denounce and resist this approach.

This is why during consultations over the new orders in the summer of 2017, the CFDT signalled its firm opposition to the so-called "employer's referendum" principle, which is quite incompatible with the right of collective bargaining and recognition of trade unions' special role in negotiating company-level agreements.

The CFDT then filed an initial application to the *Conseil d'Etat* (highest administrative court: application No. 415641) requesting it to censure Order No. 2017-1385 of 22 September 2017 before it was ultimately ratified by Article 1 of Law No. 2018-217 of 29 March 2018. It then initiated proceedings in the *Conseil d'État* to challenge the decree establishing the "employer's referendum", on the grounds, firstly, that this was in violation of ILO international conventions and, secondly, that it was incompatible with relevant European Union law and Council of Europe conventions. The *Conseil d'Etat* handed down its decision on 1 April 2019 (judgment No. 4117652).

The CFDT now considers it appropriate to challenge this measure at European level, through a collective complaint to the European Committee of Social Rights, on the grounds that it is in breach of Article 6, and more specifically Article 6§2, of the revised European Social Charter, on the right to bargain collectively.

Article 6 of the revised European Social Charter, which France has ratified, reads:

> "*With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:*
>
> 1. *to promote joint consultation between workers and employers*;
> 2. *to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;*
> 3. *to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;*
>
> *and recognise:*
>
> 4. *the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into."*

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1- General presentation of the complaint

1.1- The applicant trade union's right to lodge a complaint

The *Confédération française démocratique du travail* (the CFDT) is a representative national and cross-industry trade union affiliated to the European Trade Union Confederation and as such is entitled to submit complaints under Article 1c of the Additional Protocol to the Charter of 9 November 1995, which France has ratified.

Since the reform of trade union representativeness in France under the Law of 20 August 2008, union representation in the workplace is measured every four years at national and cross-industry levels, and in occupational branches.

In the 2013-2016 cycle, the CFDT was the leading union, with 26.39% of votes cast in the occupational elections, with a relative weighting of 30.33% (Decree of 22 June 2017 establishing the list of recognised representative trade unions at national and cross-industry level, published in the Official Journal of 30 June 2017).

The CFDT is now the main trade union in France, taking the private and public sectors as a whole.

Following a decision of its executive committee of 3 June 2019 in accordance with article 25 of the CFDT's Statutes, this complaint is presented by its secretary general, Mr Laurent Berger.

1.2- The complaint

In its report to the President of the Republic, the French Government states explicitly that the purpose of the Order of 22 September 2017 is to provide "pragmatic solutions for very small and medium-sized undertakings, with a view to strengthening collective bargaining. The reform enables all the undertakings in France, whatever their number of employees, to have direct and simple access to the negotiation process, which is at the very core of this project".

The Government continues: "the reform is particularly concerned with the situation faced by very small undertakings, which lack either a trade union representative or an elected representative to carry out negotiations. Employers of very small undertakings now have the option of negotiating directly with their employees on every subject. Very small undertakings will therefore benefit from the same flexibility and the same ability to apply the relevant legislation as large undertakings, with respect to pay, working hours and organisation of the work process, which managers of such undertakings will be able to negotiate directly with their employees. The latter will have a guaranteed right of access to draft agreements submitted to them and the right to consult trade unions at *département* level, if they so wish, to help them to clarify their position before consultation starts." It should be noted that although the relevant section of the legislation (Article L. 2232-21 of the Labour Code) does specify a minimum period of fifteen days between the submission of a draft agreement to employees and their approval of it, there is no reference whatever to employees' right to consult relevant trade unions.

The Government also states that "agreements will be validated if two-thirds of the workforce give their approval. This option is not confined to undertakings with fewer than 11 employees but will be available to all undertakings with fewer than 20 employees that have no elected staff representative."

In other words, in very small undertakings with no trade union presence, and therefore the most vulnerable employees, the clear purpose is to strengthen the unilateral powers of employers to establish "collective agreements" by avoiding negotiations with employees' trade union representatives. **This is incompatible with the provisions of Article 6§2 of the Charter on the right to bargain collectively**.

The CFDT therefore asks the European Committee of Social Rights to rule that the establishment of "collective agreements" in small undertakings, as provided for in Article 8 of the Order of 22 September 2017 and the Implementing Decree of 26 December 2017, is in breach of Article 6§2 of the revised European Social Charter on the right to bargain collectively.

The CFDT considers that involving employee representatives in negotiations is a guarantee of the negotiators' independence from employers, thus maintaining a balance in the process which is absent from the individual contractual relationship. It also serves to ensure that employees' collective interests are taken into account rather than just their individual interests.

Having negotiations conducted by representatives, if possible union representatives, is thus an inherent part of the collective bargaining process. Without such participation, collective bargaining cannot be deemed to have taken place.

The involvement of union representatives, trained and supported by representative trade unions, is essential to offset the imbalance created by employees' subordinate relationship to their employer. Trade union representatives are protected against dismissal, which gives them greater freedom to exercise their role[1]. When they are carrying out this function, employers are forbidden from using their disciplinary powers, other than when union representatives abuse their position[2]. To put it another way, **without representation there can be no negotiation**, since by definition the conduct of negotiations requires the formulation of proposals and counter-proposals.

2- 2- The new legislation on the arrangements for establishing collective agreements in small undertakings

2.1- Applicable domestic law before the Order of 22 September 2017

[1] Art. L.2421-1 Labour Code
[2] Cass.soc.10.06.10, No. 09666.792

2.1.1- Preamble to the 1946 Constitution

The Constitution itself safeguards the principles of participation, in sub-paragraph 8 of the Preamble to the 1946 Constitution, and of freedom to organise, in sub-paragraph 6.

Under the first of these constitutional principles: "*All workers shall, through the intermediary of their representatives, participate in the collective determination of their conditions of work and in the management of the work place.*"

The second states that "*all men may defend their rights and interests through union action.*"

The new provisions that are being challenged are incompatible with these principles since they clearly dispense with the involvement of employee representatives, whereas the Preamble to the 1946 Constitution stipulates that the collective determination of working conditions must be through "the intermediary of [employees'] representatives".

2.1.2- The legislation

Before the Order of 22 September 2017 came into force, the Labour Code did not include any specific provisions on the collective bargaining process in very small undertakings without trade union representation: namely undertakings with fewer than 11 employees and ones with 11 to 20 employees without an elected representative. The only distinction it made was between undertakings with fewer than 50 employees with no trade union representation and ones with 50 employees or more.

Under L.2232-24 of the Labour Code, in undertakings with fewer than 50 employees and no union representation:

"*(. ..) when, following the procedure laid down in Article L. 2232-23-1, no elected representative has evinced any willingness to negotiate, company or establishment agreements may be negotiated, concluded or revised by one or more employees expressly assigned to do so by one or more representative trade unions in the branch or, in their absence, by one or more representative trade unions at national or cross-industry level. One trade union may only assign one single employee for that purpose.*

Representative trade unions in the branch in which an undertaking operates or, in their absence, the representative trade unions at national or cross-industry level shall be informed by employers concerned of their decision to enter into negotiations.

This article applies to undertakings with no trade union representation in which the absence of elected employee representatives has been officially reported and to undertakings with fewer than 11 employees."

Thus, in the context of undertakings now covered by the new "employer's referendum", employers wishing to negotiate a collective agreement were first obliged to inform representative trade unions at branch level, or in their absence national/cross-industry level, who would then assign an employee to undertake the negotiations.

Representative trade unions were not bypassed in this bargaining process and the relevant legal provisions encouraged trade union activity in small undertakings.

2.2- Applicable domestic law after the Order of 22 September 2017

With the Order of 22 September 2017, the law now permits "collective agreements" to be drawn up in the absence of any negotiation with representative trade unions.

More specifically, under the new Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code, in undertakings with fewer than 11 employees and no union representative and ones with 11 to 20 employees where there is no elected member of the staff delegation to the undertaking's social and economic committee, employers can submit to employees an "agreement" (or a supplementary amending "agreement") drawn up purely

unilaterally, for approval by referendum.

Staff consultation takes place after a minimum period of fifteen days from submission of the draft agreement to each employee.

To be ratified and have the same legal force as a company-level agreement, the draft agreement must be approved by a two-thirds majority of the staff.

Such “agreements”, which have not been previously negotiated, must therefore be deemed to have the same status as any company collective agreement, with all the consequences that this entails[3]. In such cases, representative trade unions are left completely out of the picture.

What makes these “collective agreements” that have not been negotiated with the unions even more dangerous is that they can cover a whole series of matters subject to exceptions in the Labour Code, other than areas where branch agreements take precedence. For example, employers can propose “agreements” on working hours, bonuses or compensation for termination of contracts.

Finally, the Order of 22 September 2017 embodies the principle that collective agreements can take precedence over employment contracts by extending the scope of agreements concluded to include their employment implications in individual employee’s employment contracts. Employees who refuse to accept changes to their contracts may then be dismissed. It is greatly to be feared that such agreements, known as collective performance agreements, pose a threat to employees when they are imposed unilaterally by employers.

A study carried out by Dares (research and statistics directorate of the Labour Ministry) submitted to trade unions as part of the monitoring of the orders of 22 September 2017 confirmed our concerns. It shows that various undertakings have concluded collective performance agreements using the “employer’s referendum” procedure without any negotiation.

Examples of aspects to be founds in these agreements include:

- annualisation of working hours;

[3] The power granted to employers to establish such “collective agreements” extends to the procedure for terminating such agreements, or supplementary amending agreements. When employees seek to terminate these agreements the notice of termination must be notified collectively to the employer in writing and by two-thirds of the workforce. Termination by employees is also only possible for a period of one month before each anniversary date of the conclusion of the contract (Art. L. 2232-22 of the Labour Code)

- higher overtime payments replaced by compensatory time off, at the employer's convenience and decided on by the employer;
- mobility extended to a radius of 15 km around the site of the undertaking and throughout France for certain duties with no reference to any form of compensation;
- working week (normally 37½ hours) of up to 55 hours or 13 hours in any one day;
- for employees on hours packages, work beyond 37½ hours must be performed at the request of hierarchical management. If management's requests are refused, employees may be liable to disciplinary penalties;
- employer free to change employees' working conditions, so long as there is no abuse of right;
- trial periods, measures to reduce absenteeism, and attendance bonuses to reward faithful and loyal employees also feature in the above agreement, although items that can appear in a collective performance agreement are strictly limited;
- introduction of working days packages for all employees to deal with the growing number of orders in an undertaking in a very good state of health.

These new provisions that exclude trade unions are clearly incompatible with the right to bargain collectively embodied in Article 6§2 of the revised Charter.

Admittedly, these provisions do not prohibit union involvement but they are such as to allow undertakings of up to 20 employees effectively to bypass trade unions.

2.2.1- Undertakings with fewer than 11 employees

Article L. 2232-21 of the Labour Code authorises employers in undertakings which normally have fewer than 11 employees and have no union representative to propose draft agreements to their workforce members.

It should again be noted that collective bargaining is the main function of the union representatives designated by undertakings' representative trade unions. They are the intermediaries through whom unions inform employers of their claims, demands or proposals and negotiate collective agreements.

Under Article L. 2143-3 of the Labour Code, in undertakings of 50 employees or more who have set up a union branch, the right to designate a union representative is confined to representative trade unions.

The article also specifies that to qualify as union representatives those concerned must have stood as candidates in workplace elections and have personally obtained at least ten percent of the votes cast in the first round in their particular section. In certain cases, however, unions may designate candidates who have obtained less than ten percent of votes cast or, in their absence, ordinary members of the union in the undertaking or establishment concerned.

One specific feature applies to undertakings with fewer than 50 employees, namely that representative unions in the undertaking concerned can designate a member of the staff delegation to the undertaking's social and economic committee as the union representative (Article L. 2143-6 of the Labour Code).

In undertakings with fewer than 11 employees, employers are not obliged to organise occupational elections. As a result, **this avenue by which trade unions can establish themselves in very small businesses is largely hypothetical, or even non-existent**.

The Labour Code also authorises the appointment of a union representative by agreement. Collective and other forms of agreement may include more favourable provisions such as the right to designate locally or centrally-based union representatives in all cases where this is not already legally binding (L. 2141-10 of the Labour Code). Once again, however, this option applies more in theory than in practice.

To summarise, before the Order of 22 September 2017 representative trade unions could designate an employee to negotiate company-level agreements. This applied specifically to undertakings with fewer than 11 employees (former Article L. 2232-24). **Under the new legislation, the Labour Code no longer provides for such designations in these very small undertakings, creating another barrier to trade unions' access to small businesses.**

2.2.2- Undertakings with 11 to 20 employees

If there is no union representative or elected staff member of the social and economic committee, Article L. 2232-23 of the Labour Code offers employers the alternative of asking employees to ratify a proposed agreement.

It is possible, in theory, in undertakings with 11 to 20 employees for a union representative (a member of the staff delegation on the social and economic committee) to negotiate agreements. In practice, though, the new rules tend to inhibit unions from establishing themselves in undertakings of this size. This conclusion derives from the specific rules on the organisation of staff elections, the designation procedure and the method of determining numbers of employees.

- Regarding the organisation of staff elections, although employers with at least 11 employees are still required to hold staff elections and to use every possible means of informing their employees that the elections will take place (Article L. 2314-5 of the Labour Code), **this information is no longer supplied automatically to relevant trade unions, which clearly restricts their opportunity to establish themselves in the undertakings concerned**.

Prior to the Order, as soon as employers triggered the election procedure, they were obliged to invite the representative trade unions to negotiate a pre-electoral memorandum of understanding. Undertakings' size provided no grounds for exemption from this requirement. It therefore offered unions a means of entry into small businesses.

With the advent of the Order, in undertakings with 11 to 20 employees **if no employee comes forward as a candidate for staff elections within 30 days** of the employer's informing staff of the election, **the employer is no longer required to invite relevant unions to negotiate a pre-electoral memorandum of understanding** (Article L. 2314-5, para 5 of the Labour Code).

Hitherto, the main means by which unions could establish themselves in small businesses was to be informed of these elections and invited to negotiate the relevant memorandum of understanding. This is now no longer an obligation.

It should be noted that in the great majority of undertakings, no one stands for election.

- Regarding the procedure for designating representatives, it was formerly the case that in undertakings with 11 to 20 employees if there was no union representative, unions were given precedence in this process. This priority in making such appointments no longer holds.

Article L.2232-23-1 of the Labour Code now provides that in undertakings with 11 to 49 employees where there is no union representative, company-level agreements can be negotiated, revised or renounced:

by one or more employees expressly designated by one or more representative trade unions, or,

by one or more full members of the staff delegation of the social and economic committee (whether or not union-designated).

We are therefore justified in thinking that in the absence of a trade union representative employers will be free to choose whether to negotiate with union-designated representatives or with elected staff representatives, whether or not union-designated.

Under Article L. 2232-23-1 of the Labour Code, in undertakings with 11 to 20 employees with no union representative and no elected staff representative it is still possible for a trade union to designate an employee. However, it will not necessarily be informed by employers of their willingness to negotiate a collective agreement in the undertaking, which clearly complicates the designation process. Once again, employers have the possibility either of negotiating with a union-designated member of staff or of putting a draft agreement to a staff referendum for ratification, without any prior negotiation. **Employers who are faced with these two methods of drawing up a collective agreement will clearly be reluctant to opt for negotiation when the law also offers them the possibility of themselves drafting the "agreement" concerned.**

The new provisions do not, therefore, promote collective bargaining within the meaning of Article 6§2 of the revised Charter. Instead, they reflect a political commitment to:

removing all trade union representation in undertakings of up to 20 employees, and replacing collective bargaining with a process of direct staff consultation.

- Finally, regarding the method of determining numbers of employees, **the new rules on this subject introduced by the Order of 22 September 2017 make it more difficult to meet the required thresholds.**

It is still a requirement for undertakings with at least 11 employees to hold staff elections for membership of the social and economic committee. Previously, however, the legislation considered that the threshold of eleven had been reached **if it applied over a period of 12 months, whether or not consecutive, in the previous three years**. Under the new rules, the threshold of at least 11 employees must be satisfied over a period of **12 consecutive months** (Article L. 2311-2 of the Labour Code).

The new rules will have a dreadful impact since they are intended to make it more difficult to reach the eleven employee threshold and could encourage certain employers to purposefully misconstrue the rules and ensure that they had not had a workforce of 11 employees over 12 consecutive months.

To summarise:

Rather than enabling trade unions to become established in small undertakings these measures are designed to make it more difficult, or even impossible, for trade unions to gain a footing or secure any form of representation in such undertakings.

Moreover, the new rules result in representation in small undertakings being drained of any real meaning.

3- Violation of the revised European Social Charter and of European and international law

The Order of 22 September 2017 bypasses representative trade unions in collective bargaining in small undertakings and is therefore in breach of the revised European Social Charter. It also violates various international and European conventions to secure the right to bargain collectively through representative trade unions and the effectiveness of this right.

3.1- International and European law on social rights

3.1.1- ILO recommendations and conventions

It should be noted, firstly, that the International Labour Organisation (ILO) has enshrined freedom of association and the effective recognition of the right to collective bargaining in the four rights covered by its Declaration on Fundamental Principles and Rights at Work, adopted on 18 June 1998, which is binding on all the Organisation's members, even if they have not ratified the corresponding conventions. The right to organise and bargain collectively, embodied in **ILO Convention 98**, which is an extension of the freedom of association provided for in its **Convention 87**, are thus indissolubly linked.

Paragraph 2 of **ILO Recommendation 91** defines collective agreements as:

"*all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employers' organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other.*"

Article 4 of **ILO Convention 98**, which has been ratified by France and is directly applicable, reads:

"*Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements*".

ILO Convention 135, which France has also ratified, concerns employee representation in the workplace. Workers' representatives are defined as either trade union representatives, appointed by the unions or their members, or representatives freely elected by the workers. Article 5 makes it clear that when there are both elected and trade union representatives the existence of the former should not be used to undermine the position of the trade unions concerned.

As Gernigon, Odero and Guido have noted (ILO Principles in Collective Bargaining, International Labour Review, vol. 139 (2000) No. 1, pp. 38 ff.):

"*ILO instruments, as explained above, clearly permit collective bargaining only with representatives of the workers concerned if there are no workers' organizations in the area in question (enterprise level or higher).*

This standard is set out in Paragraph 2 of Recommendation No. 91 and is confirmed in Convention No. 135, which provides in Article 5 that "the existence of elected representatives is not used to undermine the position of the trade unions concerned or their representatives" (ILO, 1996c, p. 496); and in Convention No. 154, which also provides in Article 3, paragraph 2, that "appropriate measures shall be taken, whenever necessary, to ensure that the existence of these [workers'] representatives is not used to undermine the position of the workers' organisations concerned" (ILO, 1996d, p. 93).

The preparatory work for the Collective Agreements Recommendation, 1951 (No. 91), shows that the possibility for representatives of workers to conclude collective agreements in the absence of one or various representative organizations of workers is envisaged in the Recommendation, "taking into consideration the position of those countries in which trade union organisations have not yet reached a sufficient degree of development, and in order to enable the principles laid down in the Recommendation to be implemented in such countries" (ILO, 1951, p. 603).

The Committee on Freedom of Association maintained in one case that "direct settlements signed between an employer and a group of non-unionized workers, even when a union exists in the undertaking, does not promote collective bargaining as set out in Article 4 of Convention No. 98" (ILO, 1996a, para. 790). Going into greater detail, in another case the Committee on Freedom of Association stated that the possibility for staff delegates who represent 10 per cent of the workers to conclude collective agreements with an employer, even where one or more organizations of workers already exist, is not conducive to the development of collective bargaining in the sense of Article 4 of Convention No. 98 (ibid., para. 788). The Committee of Experts did not address these issues in its last general survey on freedom of association and collective bargaining of 1994 on Conventions No. 87 and No. 98 (ILO, 1994a), although it has done so in observations on the application in certain countries of the Conventions on freedom of association and collective bargaining, in which it has expressed a similar point of view to that of the Committee on Freedom of Association with regard to collective agreements concluded with non-unionized groups of workers (see, for example, the observations concerning Costa Rica, in ILO, 1993a, pp. 184-185; and in ILO, 1994b, pp. 203-204)."

It would therefore appear that the challenged provisions are in breach of these conventions since they encourage the abandonment of negotiations with employee, and preferably trade union, representatives in favour of the ratification of unilateral decisions by referendum, with no prior discussion with employee representatives. Moreover, they promote unilateral decision making and social monologue, to the detriment of collective bargaining and social dialogue.

The effect is to exclude employee representatives from the negotiating process, even though it can hardly be argued that the French trade union movement, which is more than a hundred years old, has not achieved a "sufficient level of development" to be a partner in negotiations.

3.1-2- Article 11 of the European Convention on Human Rights

The European Court of Human Rights **ensures that the rights embodied in the Convention are fully effective.** According to the Court, "the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective" (ECDH, 9 October 1979, *Airey v. Ireland, § 24).* This case concerned the right to an effective remedy before a domestic court.

Countries are thus obliged to ensure that the rights enshrined in the European Convention, one of which is the right of assembly, which includes the right to bargain collectively, can be properly exercised.

Article 11 of the Convention states: "*Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests*".

This article on the right of assembly is of particular significance, since according to the extensive (and evolving) interpretation of the Court of Human Rights, it also covers the right to bargain collectively (Demir and Baykara judgment, 12 November 2008, application no. 34503/97, §154).

The case of Demir and Baykara concerned a Turkish public service trade union which had brought an action in the domestic courts against a municipality for its failure to comply with the terms of a collective agreement. The Turkish Court of Cassation denied the very existence of this trade union by finding that at the time of its establishment Turkish law did not allow civil servants to join trade unions or to conduct collective bargaining. The union therefore submitted an application to the European Court asking it to find that there had been a violation of Article 11 of the Convention.

The Court found that "*having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements*" of trade union freedom (§154 of the Demir and Baykara judgment).

Thus, **the right to bargain collectively is one of the key elements of trade union freedom, without which the latter would be devoid of substance** (§144 of the judgment).

§144 of the judgment: *" … the evolution of case-law as to the substance of the right of association enshrined in Article 11 is marked by two guiding principles: firstly, the Court takes into consideration the totality of the measures taken by the State concerned in order to secure trade-union freedom, subject to its margin of appreciation; secondly, the Court does not accept restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance. These two principles are not contradictory but are correlated. This correlation implies that the Contracting State in question, while in principle being free to decide what measures it wishes to take in order to ensure compliance with Article 11, is under an obligation to take account of the elements regarded as essential by the Court's case-law*".

3.1.3- European Union law

The right to bargain collectively through social partnership is also embodied in European Union law.

Article 28 of the EU's Charter of Fundamental Rights reads: "*Workers and employers, or their respective organisations, have, in accordance with Union law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.*"

Article 152 of the Treaty on the Functioning of the European Union, on the autonomy of the social partners, states that "*The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.*"

The challenged provisions referred to earlier are clearly incompatible with the aforementioned legal provisions of the European Union.

3.2- The violation of Article 6§2 of the Charter

The new provisions arising from the Order of 22 September 2017 are clearly at variance with the view of the European Committee of Social Rights in its statement of interpretation of Article 6§2 on the right to bargain collectively, namely that states should **actively promote the conclusion of collective agreements if their spontaneous development was not satisfactory and, in particular, ensure that each side was prepared to bargain collectively with the other**.

Article 6§2 of the Charter reads: "*With a view to ensuring the effective exercise of the right*

*to bargain collectively, … the Parties undertake to promote, where necessary and appropriate, **machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements***".

Article G of the Social Charter does admittedly **authorise limitations to the right to bargain collectively enshrined in Article 6§2**. However, also according to Article G and its interpretation by the European Committee of Social Rights[4], such restrictions are subject to three cumulative conditions, namely that they:

are **prescribed by law**;

serve a legitimate purpose;

are **necessary in a democratic society for certain specified purposes**.

In other words, any restriction must be proportionate to the legitimate aim pursued.

In this case, the applicability of the third and final condition appears to be very debateable: the Government could certainly have chosen a measure other than the "employer's referendum" to promote social dialogue.

The effect of this provision is, in fact, to strengthen the unilateral powers of employers in small undertakings. It therefore leads to a total absence of negotiation within the meaning of Article 6§2 of the European Social Charter.

The right to bargain collectively is formally recognised in the case of undertakings with 11 to 20 employees but in practice this is theoretical and illusory rather than genuine and effective.

As noted earlier, in undertakings with fewer than 11 employees, employers are not obliged to hold staff elections, so this is not a meaningful avenue for unions to find a way in to such small undertakings. Moreover, the possibility of securing union representation by agreement remains extremely hypothetical. And finally, while it is still possible in undertakings with 11 to 20 employees to have a trade union representative (a member of the staff delegation to the social and economic committee) to negotiate an agreement, in practice and once again the application of the new rules tends to prevent unions from getting a foothold in such undertakings. This finding is based on the rules governing the organisation of staff elections, the designation procedure and the method of determining numbers of employees.

In the light of all these factors, it has to be concluded that articles L. 2232- 21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code, as laid down in the Order of 22 September 2017, are in violation of Article 6§2 of the European Social Charter.

4- The practical impact: biased "agreements" leading to reduced employee rights

Various "agreements" subject to referendum published on the official "Legifrance" site highlight the fact that there has been no negotiation between employers and employees' trade unions, or even with the employees themselves. This inevitably results in a reduction in existing rights with no compensatory benefits for employees.

[4] Complaint No. 118/2015 CGT-FO v. France of 03.07.18

The subjects most frequently covered in these “agreements” are ones concerning working hours and the organisation of working time (for example, increasing the number of overtime hours that can be required, the organisation of working time over periods of more than one week, the introduction of night work and Sunday working, and annual working days).

Yet in French law, the majority of working time adjustments can only be introduced in undertakings via collective agreements that take account of their impact on employees’ health and safety. This is why the collective agreements concerned must be the fruit of collective bargaining, to ensure that there are safeguards and compensatory benefits for employees.

Examples of “agreements” that clearly illustrate a lack of safeguards and compensatory benefits for employees:

One agreement[5] would reduce the supplement for overtime worked from 25% to the legal minimum of 10% and increase the number of overtime hours that employees could be asked to work annually to 250 from the 200 laid down for the hairdressing sector, with no compensatory benefits. The agreement simply included a copy-paste version of the compensatory benefits required under French law in the absence of a collective agreement.

Another agreement[6] would increase the number of overtime hours that employees could be asked to work annually to 350 from the 220 laid down for the bakery sector, with no compensatory benefits, other than a simple copy-paste version of French legal requirements regarding maximum hours worked in the absence of a collective agreement.

Another[7] would provide for the organisation of working time for part-time sales staff in the bakery sector over a one-year period without any compensatory benefits. In the absence of a collective agreement, this is only possible over nine weeks.

One agreement in the dairy industry[8] would reduce the minimum daily hours worked by part-time employees from the four hours laid down in the branch agreement to three and increase the permitted daily periods between shifts from the two hours in the branch agreement to four.

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[5] Company-level collective agreement on overtime in the company Vijan: 12.10.18
[6] Company-level collective agreement on annual overtime hours in the company Maréchal: 01.08.19
[7] Company-level collective agreement on the organisation of working time in the company Lemasson: 15.03.19
[8] Company-level collective agreement on the minimum working day and the allocation of working hours in the cheese-making company Champsaur: 12.07.18

Another agreement[9] would permit night work with no accompanying measures to improve employees' working conditions and help maintain a proper work-life balance, even though these are statutory requirements.

The same agreement provides for annual working days contracts and for employees to waive some of their rest days with no compensatory benefits other than the 10% increased pay already provided for in law. These employees are already excluded from the legal regulations on maximum working hours.

At a more anecdotal level, the very wording of some of these "agreements" reveals their non-negotiated character. For example, one such "agreement"[10] is actually headed "company-level agreement on working time by unilateral decision of the employer after approval by referendum".

Confirmation is provided by the Dares study referred to earlier. This states that 92% of the 872 submissions from undertakings with fewer than 11 employees concern agreements and addenda ratified by two-thirds of the employees and deal with working time (36% concern annual days and hours worked, 33% hours-averaging schemes and annualised hours, 31% other arrangements and 27% overtime).

Of the 233 submissions concerning overtime, 71 reduced the increase in the rate of pay to 10%, 5 to 15 %, 2 to 12 % and 2 to 20 %, for either some or all of the hours concerned. So in one-third of the agreements, the increased rate was below that laid down in the Labour Code. Thirty-eight of the agreements brought permitted annual overtime hours above the 350 level, ranging from 350 to 600, which is extremely worrying.

[9] Company-level collective agreement of the company Process Technology: 04.01.19
[10] Company-level collective agreement of the company Location de Chapiteaux: 31.05.18

5- Conclusions

It has been clearly demonstrated that the arrangements for establishing "collective agreements" in small undertakings introduced into French legislation by Article 8 of Order No. 2017-1385 of 22 September 2017 have served to strengthen employers' unilateral powers, thereby bypassing negotiations with employees' trade union representatives.

The *Confédération française démocratique du travail* (CFDT) therefore asks the European Committee of Social Rights to:

> Declare admissible the complaint lodged by the *Confédération française démocratique du travail* (CFDT);
>
> Find that the French legislation[11] on the establishment of "collective agreements" in small undertakings is in breach of Article 6§2 of the revised European Social Charter because it allows employers to establish such "agreements" in their companies without any negotiation whatever with the employees' trade unions (or with the employees themselves, who are only called on to approve or reject the document drawn up by their employer);
>
> Urge France to amend its legislation to comply with the European Social Charter.

Laurent BERGER
Secretary General of the *Confédération française démocratique du travail* (CFDT)

[11] Articles L. 2232-21, L. 2232-22, L. 2232-22-1 and L. 2232-23 of the Labour Code

DOCUMENTS IN SUPPORT OF THE CFDT'S COMPLAINT

Document 1: Collective complaint of 15 January 2020, *Confédération française démocratique du travail* against France

Document 2: Order No. 2017-1385 of 22.09.17 on strengthening the collective bargaining process.

Document 3: Implementing Decree No. 2017-1767 of 26 December 2017 on the arrangements for approving agreements in very small undertakings.

Document 4: Judgment of the *Conseil d'État,* No. 4117652 of 01.04.19.

Document 5: Collective complaint No. 118/2015 CGT-FO v. France of 03.07.18.

Document 6: Les textes conclus dans les TPE (agreements concluded in very small undertakings)*,* Catherine Daniel, DARES, *département* RPTT, 19.12.19.

Document 7: Company-level collective agreement on overtime in the company Vijan: 12.10.18.

Document 8: Company-level collective agreement on annual overtime hours in the company Maréchal: 01.08.19.

Document 9: Company-level collective agreement on the organisation of working time in the company Lemasson: 15.03.19.

Document 10: Company-level collective agreement on the minimum working day and the allocation of working hours in the cheese-making company Champsaur: 12.07.18.

Document 11: Company-level collective agreement of the company Process Technology: 04.01.19.

Document 12: Company-level collective agreement of the company Location de Chapiteaux: 31.05.18.